

I.R. NO. 2023-5

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

UNION COUNTY AND
UNION COUNTY SHERIFF,

Petitioner,

-and-

Docket No. SN-2022-043

PBA LOCAL NO. 108A
SHERIFF SUPERIOR OFFICERS,

Respondent.

SYNOPSIS

A Commission Designee denies the County's request for an interim restraint of binding arbitration pending the outcome of its scope of negotiations petition before the Public Employment Relations Commission. The PBA's grievance alleges that the County violated the parties' collective negotiations agreement when it unilaterally implemented its January 7, 2022 Special Order, which prohibited employees who tested positive for COVID-19 from reporting to work and required those employees to use their accumulated sick leave or other benefit time. The Designee finds that that paid leave is generally mandatorily negotiable and that N.J.S.A. 34:15-31.12 does not specifically preempt arbitration over the issue of restoration of paid leave while absent for a work-related illness. The Designee concludes that the County has not met the standards for granting interim relief; it has not established a substantial likelihood of prevailing in a final Commission decision on its scope of negotiations petition; it will not suffer irreparable harm if arbitration is not stayed; that the public interest will not be injured by proceeding with arbitration; and that the relative hardship to the parties weighs in favor of the PBA.

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Appearances:

For the Petitioner, Hatfield Schwartz Law Group, LLC,
(Lawrence S. Schwartz, Esq., of counsel and on the
brief)

For the Respondent, Marc D. Abramson & Associates, Inc.
(Marc D. Abramson, on the brief)

INTERLOCUTORY DECISION

On June 24, 2022, Union County and the Union County Sheriff (County) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the PBA Local 108A Sheriff Superior Officers (PBA). In its grievance, the PBA alleges that the County violated the parties' collective negotiations agreement (CNA) when it unilaterally implemented its January 7, 2022 Special Order, which prohibited employees who tested positive for COVID-19 from reporting to work and required those employees to use their accumulated sick leave or other benefit time.

PROCEDURAL HISTORY AND FACTS

On October 11, 2022, the County, pursuant to N.J.A.C. 19:13-3.11, filed the instant application for interim relief, seeking a temporary stay of the arbitration scheduled for November 17, 2022. On October 12, 2022, I signed an Order to Show Cause directing the PBA to file any opposition by October 19 and setting October 26 as the return date for oral argument, which was later rescheduled for November 3. On October 18, the PBA filed its opposition to the application for interim relief. On November 3, counsel for the parties participated in oral argument during a telephone conference call with me. In support of the County's application for interim relief, it filed a brief with exhibits. In opposition, the PBA submitted a brief with an exhibit. The record also includes the briefs and exhibits submitted by the parties in the underlying scope of negotiations petition. These facts appear.

The PBA is the majority representative for all of the County's Sheriff's Superior Officers through and including the rank of Captain at its location at the Courthouse, Elizabeth, New Jersey, or some other locations under the jurisdiction of the County. The County and PBA are parties to a CNA with a term of January 1, 2018 through December 31, 2020, which continues to be in effect. The grievance procedure ends in binding arbitration.

On February 3, 2022, the PBA filed a grievance challenging

the County's Special Order prohibiting employees who test positive for COVID-19 from reporting to work and requiring they use accrued sick leave or other benefit time for missed work days. The PBA claims that four unit members missed work due to COVID-19 between January 12 and June 6, 2022. The grievance alleges violations of the CNA's Articles 7 (Retention of Existing Benefits), 23 (On the Job Injury), and 24 (Sick Leave). The grievance seeks as a remedy for the County to cease and desist from making employees use sick leave for COVID-19 infections and that members affected by the Special Order be made whole financially or have the sick days that were taken due to COVID-19 infections restored.

STANDARD OF REVIEW

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

The first Crowe factor hinges on the substantial likelihood of the County prevailing on a final Commission decision on its scope of negotiations petition. In a scope of negotiations determination, the Commission's jurisdiction is narrow.

Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J.

144, 154 (1978) states:

The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, we do not consider the contractual merits of the grievance or any contractual defenses the employer may have.

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A.

34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. State v. State

Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978). If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable.

Arbitration is permitted if the subject of the grievance is mandatorily or permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd, NJPER Supp.2d 130 (¶111 App. Div. 1983). Thus, if a grievance is either mandatorily or permissively negotiable, then an arbitrator can determine whether the grievance should be sustained or dismissed. Where a statute or regulation addresses a term and condition of employment, negotiations are preempted only if it speaks in the imperative and fixes a term and condition of employment expressly, specifically and comprehensively. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J.

54, 80-82 (1978). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

LEGAL ARGUMENTS

The County argues that it has a substantial likelihood of prevailing in its scope of negotiations petition because the PBA's grievance is statutorily preempted by N.J.S.A. 34:15-31.12^{1/} and the parties' CNA requires employees to use sick leave due to exposure to contagious disease and to be compensated through worker's compensation insurance for work-related injuries, such as COVID-19. The County further argues that arbitration of the PBA's grievance would substantially limit the County's policymaking powers because requiring the use of sick days for positive COVID-19 infections was implemented to mitigate the

^{1/} N.J.S.A. 34:15-31.12 provides: "If, during the public health emergency declared by an executive order of the Governor and any extension of the order, an individual contracts coronavirus disease 2019 during a time period in which the individual is working in a place of employment other than the individual's own residence as a health care worker, public safety worker, or other essential employee, there shall be a rebuttable presumption that the contraction of the disease is work-related and fully compensable for the purposes of benefits provided under R.S.34:15-1 et seq., ordinary and accidental disability retirement, and any other benefits provided by law to individuals suffering injury or illness through the course of their employment. This prima facie presumption may be rebutted by a preponderance of the evidence showing that the worker was not exposed to the disease while working in the place of employment other than the individual's own residence."

spread of the virus and to protect the public and the County's employees. The County asserts that it will suffer irreparable harm if the arbitration is not stayed because an arbitral ruling overturning its Special Order will permit employees to report to work even if they test positive for COVID-19, thereby increasing the risk of an outbreak and endangering the public. The County further asserts that the public interest will not be injured by staying the arbitration because it serves the public interest to enforce the parties' CNA requiring the use of sick leave for contagious diseases and the public interest is harmed by the County having to pay the cost of litigating a grievance that may ultimately be non-arbitrable. Lastly, the County maintains that the relative hardships to the parties is in favor of the County. The County asserts while arbitration could jeopardize the County's Special Order, weakening the County's COVID-19 mitigation efforts and incurring the time and expense of arbitration, the PBA's grievance would only be delayed awhile longer while the County's scope petition is decided.

The PBA argues the County's request for a stay of the arbitration should be denied because it has not met any of the standards for the issuance of interim relief. The PBA asserts that its grievance is not challenging the County's prohibition against allowing employees who test positive for COVID-19 from reporting to work, but rather the PBA's grievance is objecting to

forcing the employees to use sick leave or other benefit time for COVID-19 related absences. Thus, the County's concerns that an arbitral ruling will undermine the Special Order leading to a COVID-19 outbreak due to employees reporting sick to work are unfounded. The PBA further argues that the central issue in the grievance is whether these employees are entitled to restoration and/or compensation for their used sick leave, which is mandatorily negotiable and legally arbitrable. The recoupment of sick leave is an issue of compensation, which can be resolved through a monetary remedy, making interim relief inappropriate. The PBA asserts that the County's contractual defenses to the grievance are issues for an arbitrator to decide.

ANALYSIS

The courts and Commission have held that paid sick leave and other leaves of absence are ordinarily mandatorily negotiable terms and conditions of employment because they intimately and directly affect employee work and welfare and do not significantly interfere with the determination of governmental policy. City of East Orange, P.E.R.C. No. 2022-15, 48 NJPER 213 (¶47 2021) (Internal citations omitted). The Commission has also specifically addressed the issue of compensation and reimbursement of sick leave for an employee's COVID-19 related absence and held that the issue is mandatorily negotiable and legally arbitrable. Ibid.; see also Millburn Tp., P.E.R.C. No.

2021-30, 47 NJPER 373 (¶87 2021) (reimbursement of sick leave for COVID-19 quarantine period is negotiable); Edison Tp., P.E.R.C. No. 2021-31, 47 NJPER 375 (¶88 2021) (issue of compensation during absence due to COVID-19 travel quarantine policy is negotiable).

Here, given the above precedent, we find that the County does not have a substantial likelihood of prevailing in its scope of negotiations petition. The instant matter is nearly identical to East Orange, supra. In East Orange, the Commission denied the City's request to restrain arbitration of a grievance challenging the City's deduction of sick leave and benefit time for the grievant's COVID-19 related absences, finding that worker's compensation laws, and specifically N.J.S.A. 34:15-31.12 - the same statute cited by the County, do not statutorily preempt or foreclose grievances challenging the improper deduction of sick leave. The County's attempt to distinguish East Orange from the instant matter is unavailing. The County argues that the grievant in East Orange contracted COVID-19 during the height of the pandemic and the grievants at issue here contracted COVID-19 in May 2022 after the public health emergency officially ended.^{2/}

^{2/} The PBA refutes the assertion that the grievants in the instant matter were affected after the public health emergency subsided, stating that the grievants at issue here were affected between January 12 and June 6, 2022, a significant portion of that period was under the Governor's Executive Order No. 280 which reinstated the public health (continued...)

This argument is unpersuasive and cuts against the County's position. If the Commission found arbitration did not significantly interfere with the City's policymaking powers in East Orange during the height of the pandemic, then it stands to reason it would be even less so after the public health emergency has abated. The County further distinguishes East Orange by asserting that the instant CNA does not have comparable contractual clauses that were at issue in that case, namely that the instant CNA requires that sick leave be used due to exposure to contagious diseases. However, as established in Ridgfield Park, the Commission does not consider contractual defenses to a grievance in determining a scope of negotiations petition. In East Orange, the Commission found, citing well established precedent, that the general subject of sick leave use was mandatorily negotiable and legally arbitrable, and I find no compelling argument to deviate from that result. Both of the County's main arguments regarding the parties' CNA provisions that require employees to use sick leave for contagious diseases and that work-related injuries like COVID-19 must be compensated through workers compensation insurance are contractual defenses to be decided by an arbitrator.

Regarding the County's argument that N.J.S.A. 34:15-31.12

2/ (...continued)
emergency on January 11, 2022 and was rescinded by Executive Order No. 292 effective March 7, 2022.

statutorily preempts the PBA's grievance, I find that the statute does not "expressly, specifically and comprehensively" preempt the grievance's assertion that sick leave was improperly deducted in violation of the parties' CNA and should be restored.

The statute establishes a rebuttable presumption that COVID-19 is a work-related illness for essential workers and explicitly states that it shall not be construed to reduce or limit other employee benefits provided by law.^{3/} See East Orange, supra.

Moreover, the Commission has consistently held that workers' compensation laws do not foreclose a majority representative's efforts to enforce contractual clauses providing leaves of absence for injury or sickness by seeking remedies such as restoration of sick leave days. See Burlington Cty., P.E.R.C. No. 97-84, 23 NJPER 122 (¶28058 1997), aff'd, 24 NJPER 200 (¶29092 App. Div. 1998) (restoration of paid sick leave); State of New Jersey, P.E.R.C. No. 2020-28, 46 NJPER 244 (¶58 2019) (restoration of paid sick leave); Paterson State-Operated School Dist., P.E.R.C. No. 2002-75, 28 NJPER 259 (¶33099 2002) (restoration of paid sick leave); see also Mercer Cty., P.E.R.C. No. 2015-46, 41 NJPER 339 (¶107 2015); City of East Orange,

^{3/} N.J.S.A. 34:15-31.14, provides: "This act [C.34:15-31.11 et seq.] is intended to affirm certain rights of essential employees under the circumstances specified in this act, and shall not be construed as reducing, limiting or curtailing any rights of any worker or employee to benefits provided by law."

P.E.R.C. No. 99-34, 24 NJPER 511 (¶29237 1998) (restoration of paid sick leave); and Burlington Cty., P.E.R.C. No. 98-86, 24 NJPER 74 (¶29041 1997) (restoration of paid sick leave).

Further, if the County wishes to rely on N.J.S.A. 34:15-31.12 in support of its Special Order at arbitration, the arbitrator is empowered to consider and apply any relevant statutes as necessary. Grievances involving the interpretation, application, or claimed violation of statutes and regulations may be resolved by binding arbitration as long as the award does not have the effect of establishing a provision of a negotiated agreement inconsistent with the law. See Old Bridge Bd. of Education v. Old Bridge Education Assoc., 98 N.J. 523, 527-528 (1985); West Windsor Twp. v. PERC, 78 N.J. 98, 115-117 (1978).

Additionally, the County's reliance on Edison Tp., I.R. No. 2021-13, 47 NJPER 249 (¶57 2020) is inapt, as the temporary restraint of arbitration granted therein was ultimately rescinded by the Commission in Edison Tp., P.E.R.C. No. 2021-31. In Edison, supra, the Commission found that Edison's managerial prerogative to require a quarantine for employees exposed to COVID-19 is severable from the issue of compensation (i.e. use of sick leave) during the period of quarantine. Similarly, the PBA's grievance is not challenging whether the County may prohibit employees infected with COVID-19 from reporting to work, but rather, the issue is what type of compensation are these

employees entitled to for their missed work time or if they could choose to be unpaid rather than be forced to use their benefit time. As in Edison, I find the issue of compensation and use of sick leave for COVID-19 infections is severable, and therefore, arbitrable.

Lastly, I find that the County does not have a substantial likelihood of prevailing in its scope petition because arbitration would not significantly interfere with its policymaking powers. As stated above, the grievance is primarily concerned with compensation - whether the affected grievants will have their sick time restored. Even if the County is found to have violated the CNA regarding its deduction of the grievants' sick time, such a ruling does not affect the County's non-negotiable managerial prerogative to restrict COVID-19 positive employees from reporting to work. See Edison, supra, ("In barring potentially exposed firefighters from reporting to work during the quarantine period, the policy addresses a legitimate safety concern, that of shielding other employees and members of the public from potential exposure to the virus.")

Having found that the County does not have a substantial likelihood of prevailing in a final decision on its scope petition, I briefly turn to the remaining Crowe factors. First, I find that the County will not suffer irreparable harm if the arbitration is not stayed. Irreparable harm is by definition

harm that cannot be remedied at the conclusion of a final Commission determination. State of New Jersey (Kean University), I.R. No. 2019-2, 45 NJPER 61 (¶17 2018). Ordinarily, where the final remedy is primarily money, the Commission is reluctant to grant interim relief. Township of Maplewood, I.R. No. 2009-26, 35 NJPER 184 (¶70 2009); Union Cty., I.R. No. 99-15, 25 NJPER 192 (¶30088 1999). Money alone, without additional factors demonstrating particular hardship, does not support irreparable harm. See Sussex County Bd. of Freeholders & Sussex County Sheriff, I.R. No. 2003-13, 29 NJPER 274 (¶81 2003). As stated above, the grievance primarily addresses severable issues of compensation i.e. whether the grievants' sick leave will be reinstated or not. Arbitration over the grievance will not prevent the County from restricting COVID-19 infected employees from reporting to work and mitigating against an outbreak. Moreover, the County's time and expense of litigating the grievance is monetary in nature and does not rise to the level of irreparable harm. Further, for the same reasons articulated above, the public interest will not be injured if the County's request for interim relief is denied. Lastly, the relative hardship to the parties in granting or denying relief weighs in favor of the PBA. While the County's COVID-19 mitigation efforts will not be thwarted or undermined by arbitration over the grievance, the PBA and its members will continue to have sick

leave and benefit time deducted for COVID-19 infections as a result of the County's Special Order. The County's argument that an arbitral ruling will undermine its non-negotiable managerial prerogative to mitigate against the spread of COVID-19 is unpersuasive. The Commission does not speculate about what remedies might or might not be lawful or appropriate if a grievance is sustained. Any challenges to a remedy awarded can be raised in post-arbitration proceedings, if necessary.

CONCLUSION

Given the legal precepts and analysis set forth above, I find that the Commission's interim relief standards have not been met by the County. Accordingly, I deny the County's application for interim relief. This case will be referred to the Commission for final disposition.

ORDER

Union County's application for interim relief is denied, and the arbitration is not stayed, subject to the Commission's final determination of the County's scope of negotiations petition.

/s/ Ramiro Perez

Ramiro Perez
Commission Designee

DATED: November 9, 2022

Trenton, New Jersey